UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

WESTERN WATERPROOFING COMPANY[1]

Employer

and

LOCAL 1, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFT WORKERS, AFL-CIO[2]

Petitioner **Case 7-RC-23011**

and

LOCAL 514, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO

Intervenor

APPEARANCES:

Robert E. Day, Attorney, of Detroit, Michigan, for the Employer.
John R. Canzano, Attorney, of Southfield, Michigan, for the Petitioner.
Daniel G. Helton, Attorney, of Detroit, Michigan, for the Intervenor.

DECISION AND DIRECTION OF ELECTIONS

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.
[3] All parties filed briefs, which were carefully considered.

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Petitioner's original petition filed on June 21, 2006, sought to represent all full-time and regular part-time employees engaged in cement finishing who work out of the Employer's facility at 13800 Eckles Road, Livonia, Michigan; but excluding all other employees. On June 30, the Petitioner amended its petition and now seeks to represent all full-time and regular part-time employees engaged in masonry and concrete restoration, bricklaying, pointing, cleaning, caulking, and cement finishing employed by and working out of the Employer's Livonia facility; but excluding all other employees, office clerical employees, and guards and supervisors as defined in the Act. The job classifications in the petitioned-for unit include bricklayers and cement finishers. The Employer and Intervenor maintain that the petitioned-for unit is inappropriate inasmuch as the petitioned-for bricklayer and cement finisher employees have been separately represented for many years. The Intervenor seeks to represent all full-time and regular part-time employees engaged in cement finishing working out of the Employer's Livonia facility; but excluding all other employees, bricklayer-restoration employees, office clerical employees, and guards and supervisors as defined in the Act.

I find that the Petitioner has not established sufficiently compelling circumstances that would warrant disturbing the established separate units currently represented by the Petitioner and Intervenor, and that maintaining the separate existing units of bricklayers and cement finishers is not repugnant to the Act. Thus, I will direct an election in two separate units. However, I further find that if a majority of valid votes in each of the separate units is cast for the same union, a combined unit of bricklayers and cement finishers also would be appropriate. Therefore, I will direct a self-determination election for one or both of the units depending upon whether one or both of the unions participate in the elections for both units.

Business Operations

The Employer is engaged in the building and construction industry providing commercial building restoration and waterproofing services to customers. Besides the Livonia facility, the Employer operates three other facilities, in Minneapolis, Minnesota, and Cincinnati and Cleveland, Ohio. In carrying out its Livonia operations, the Employer employs, inter alia, bricklayers, cement finishers, laborers, roofers, operating engineers, carpenters, ironworkers, and a warehouse staff of truck drivers, material handlers, and mechanics. The Employer employs about 400-500 hourly employees, including approximately 60 bricklayers, 18 cement finishers, 100 laborers, 30 roofers, 12 operating engineers, 15 carpenters, 3 ironworkers, and 25 warehouse staff employees. All of these employee classifications are represented in separate bargaining units by various labor organizations.

The Employer's president, Robert Mazur, oversees all of the Employer's operations. Vice-presidents John Mazur, Bill Darren, and Kevin Houle report to Robert Mazur. The Livonia facility is divided into two departments: the new work department and the restoration department. John Mazur and Darren oversee the new work department and Robert Mazur oversees the restoration department. Houle is responsible for accounting matters, including wage and fringe benefit compliance with a number of collective bargaining agreements between the Employer and various trade unions.

Six superintendents report to the three vice-presidents. Superintendents Mike Coseway, Ed Conrad, and Eric Blaine are in charge of the new work department and superintendents Richard Maxwell, Charles Shipley, and Mike Ramey are in charge of the restoration department. Reporting to the superintendents are a number of foremen at the jobsites. They consist of various trade employees who are in the bargaining units covered by various collective bargaining agreements. Reporting to the foremen at the jobsites are a number of trade employees, including bricklayers, cement finishers, laborers, roofers, operating engineers, carpenters, and ironworkers. The Employer uses a "composite" crew of various trade employees at each jobsite to accomplish its designated projects.

Although one of the two departments is designated as "new work," the record indicates that for a number of years the Employer has not performed any new construction work. The record is unclear as to the specific work performed in the new work department, but it appears that it performs building restoration work, consisting primarily of restoration of brick building façades. The restoration department engages in parking structure restoration and also building façade restoration.

Collective Bargaining History

From 1992 to June 1994, the Employer was a party to a multi-employer collective bargaining agreement between the Associated General Contractors, Detroit Chapter, Inc. and the Intervenor and Locals 2 and 26 of the Petitioner's International Union covering cement mason employees. After this joint agreement expired, the Employer entered into a series of separate collective bargaining agreements with each of the Petitioner and Intervenor unions.[4]

The Employer and Petitioner have been parties to a series of Section 8(f) collective bargaining agreements covering bricklayer-restoration employees from 1994 to 2006. The most recent contract between the Employer and Petitioner expired on May 31, 2006.[5] The parties are currently engaged in collective bargaining negotiations for a successor contract covering bricklayer employees only.

Likewise, the Employer and Intervenor have been parties to a series of Section 8(f) collective bargaining agreements covering cement mason employees.[6] From 1994 to 1997, the Employer was a party to an agreement with the Intervenor and Cement Masons Local 1, the same entity as the Petitioner, covering cement masons only.[7] The Employer thereafter entered into a Memorandum of Agreement with the Intervenor only covering cement masons, effective 1997 to 2001. At the expiration of the 1997-2001 agreement, the parties engaged in collective bargaining negotiations for a successor agreement, but were unsuccessful in reaching another agreement. From 2001 to June 1, 2006 there was no collective bargaining agreement covering the cement masons. However, during this time, the Employer continued to raise cement mason wages in accordance with area standards as identified by the Intervenor. Additionally, the Employer continued to make fringe benefit contributions on behalf of the cement masons to the same cement masons' fringe benefit funds it had been making contributions to during the contractual periods.

In about December 2005, the Employer and Intervenor recommenced collective bargaining negotiations regarding the cement finishers. In June 2006,

---

[4] The record is silent as to the current status of Locals 2 and 26 of the Petitioner's International Union.

[5] Although these collective bargaining agreements note the Employer recognizes the Petitioner as the sole and exclusive bargaining representative of the bricklayer employees and acknowledges that the Petitioner has represented and continues to represent a majority of those employees within the meaning of Section 9(a) of the Act, I find that this contract language is not sufficient to independently establish Section 9(a) bargaining status. See ***Central Illinois Construction***, 335 NLRB 717 (2001). Moreover, as the most recent contract between the parties expired on May 31, 2006, the Petitioner's petition is timely whether the agreement in question was a Section 8(f) or 9(a) agreement.

[6] Although these employees mostly are referred to as cement finishers in the record, the various contracts covering these employees refer to them as cement masons. The terms are used interchangeably in this decision.

[7] The record indicates that Cement Masons Local 1 was a d/b/a of the Petitioner.

they reached a collective bargaining agreement, effective June 1, 2006 to June 1, 2009. Before that agreement was reached, in about May 2006, the Petitioner, during negotiation for its successor agreement, presented without any prior notice a proposed collective bargaining agreement to the Employer for a separate unit of cement finishers. While the proposed effective dates were from 2001 to 2005, the proposal was for a contract beginning in 2006. The Employer rejected the proposed contract.

The record is silent as to the existence of any other Detroit area collective bargaining agreements involving other employers providing for the joint coverage of bricklayer and cement finisher employees. Regarding the Employer's three facilities outside of Michigan, one facility does not employ union-represented bricklayers or cement finishers. At the other two facilities, the bricklayers and cement finishers are in separate bargaining units and are represented by different unions.

Community of Interest between the Bricklayers and Cement Finishers

The bricklayers and cement finishers have different compensation and employment benefits; unique qualifications, training and skills; different apprenticeship programs; and different tools of the trade. More specifically, the bricklayers earn $2.35 per hour more than the cement finishers. All fringe benefit contribution rates, except for health and welfare, are different between the two groups, with the bricklayers earning $2.14 per hour more in benefits.[8]

As noted earlier, the record is unclear as to the specific work performed in the new work department. However, it appears that the bricklayers perform more work in this department, as well as working in the building façade portion of the restoration department. The cement finishers are more associated with the parking structure restoration part of the restoration department. The Employer employs a "composite crew" on most, if not all, of its projects, entailing a joint effort among bricklayers, cement finishers, laborers, operating engineers, roofers, carpenters, and ironworkers. While each employee group has its own specific trade and skill set, there may be occasional overlap among all of the employee groups in an effort to complete the overall job. For example, overlap may occur in the placement of expansion joints, application of sealants, caulking, application of traffic coating membranes, application of masonry coatings, epoxy injections, and erection of scaffolding.

Employees are often hired in as general laborers and work their way up to a skilled trade, such as bricklayer, cement finisher, roofer, or carpenter. Generally,

[8] The record indicates that about six to eight employees who perform cement finishing work are paid bricklayer wage rates and fringe benefits under the bricklayer collective bargaining agreement so that they receive the higher rate of pay.

there is a three to four year apprenticeship program with each of the various skilled trades. During this time, the apprentice employees are trained in the skills of the particular trade before reaching the level of full-scale journeyman.

Despite the overlap among the employee groups as described above, for the most part, cement finisher duties are separate and distinct from bricklayer duties. The cement finishers are responsible for the pouring and finishing of concrete and shotcrete,[9] concrete patching, and elevator pit leak repairs. Because the Employer is a restoration contractor, it does not perform any new construction or traditional brick work, including the laying of brick walls. Rather, the Employer's bricklayers perform bricklaying work relating to building restoration, including brick and stone replacement, sandblasting, water blasting, and tuck pointing. Because restoration work creates the need for a greater number of bricklayers, the Employer employs many more bricklayers than cement finishers.

There are certain tools of the cement finishing trade traditionally used by cement finishers, such as a straight edge, hand float, bull float, finishing broom, edger, joiner, and shotcrete nozzle. While both groups of employees traditionally use trowels in applying their trade skills, they use different kinds of trowels.

A number of cement finishers possess ACI certifications by the American Concrete Institute or ASI certifications by the American Shotcrete Institute. This certification is not offered to any other trade employees. However, the certification classes are locally held at and run by the Bricklayers International Union. Additionally, the Bricklayers International Union conducts apprenticeship training for bricklayers, which includes training in a few cement finishing skills such as cement/concrete pouring and cement patching, in addition to a vast amount of training in brick-related skills. Despite this evidence of cross-training for the bricklayers in some cement finishing skills, there is no evidence that the two groups of employees participate in each other's apprenticeship training programs.

Analysis

The Petitioner argues that if the petitioned-for unit is determined to be appropriate, the inquiry ends there as there is nothing in the Act that requires the unit for bargaining to be the only appropriate unit or the most appropriate unit. It contends the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed under the Act. However, this premise addresses the more customary situation in which a union is petitioning for a unit that is not currently represented and does not have a history of collective bargaining. "The Board usually applies the community-of-

[9] Shotcrete is a type of concrete that is applied through a pressure nozzle into wall cavities or overhead.

interest and plant-wide unit tests only when delineating units of previously unrepresented employees, not, as here, when it is assessing historical units that have had long periods of successful collective bargaining." ***Canal Carting, Inc.***, 339 NLRB 969 (2003), quoting ***Trident Seafoods, Inc. v. NLRB***, 101 F.3d 111, 118 (D.C. Cir 1996).

The Board has long held that long-established bargaining units will not be disturbed as long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. ***Canal Carting, Inc.,*** supra at 970; ***Buffalo Broadcasting Co***., 242 NLRB 1105, 1105-1006 fn. 2 (1979). The party challenging the historical unit bears the burden of showing that the unit is no longer appropriate. ***Canal Carting,*** supra. Accordingly, the Board is reluctant, absent compelling circumstances, to disturb bargaining units established by mutual consent where there has been a long history of continuous bargaining, even in cases where the Board would not have found the unit to be appropriate if presented with the issue ab initio. ***Kaiser Foundation Hospitals***, 312 NLRB 933, 936 (1993).

The Petitioner argues in its brief that even if bargaining history is found to weigh in favor of separate units, under Board precedent, bargaining history is neither entitled to controlling weight nor weight over other community of interest factors. In support of this position, the Petitioner cites ***Alley Drywall, Inc.***, 333 NLRB 1005 (2001) and ***A.C. Pavement Striping Co.***, 296 NLRB 206 (1989). In this regard, the Petitioner argues that a community of interest analysis of the two groups of employees mandates a finding that the petitioned-for unit is appropriate.

In ***Alley Drywall***, the petitioner, a local of the Operative Plasterers and Cement Masons Union, sought to represent a single employer unit of plasterers. The intervenors, locals of the International Bricklayers Union, also represented plasterers employed by the Employer working in one specific county. They argued that the petitioned-for unit was inappropriate as it was broader in geographical scope than that which the petitioner had historically represented through its Section 8(f) agreement with the Employer. The Board denied the intervenors' request for review. In the underlying decision and direction of election, the Regional Director found that bargaining history was not conclusive and the petitioned-for unit was appropriate. ***Alley Drywall*** is distinguishable from the instant case. The issue there was not whether to combine two historically separate units of employees, but rather whether to perpetuate an arbitrary geographical division of the same employees into separate units based upon where they are working. ***Id***. at 1007.

In ***A.C. Pavement Striping***, the employer was engaged in providing pavement coatings and pavement markings at state, county and municipal construction projects. The Employer was signatory to a Section 8(f) agreement

with the Painters Union covering painters, decorators, paperhangers, drywall tapers, and applicators. The Employer also was signatory to another Section 8(f) agreement with the Teamsters Union covering all other employees engaged in pavement coating and marking work. The employer petitioned for an overall plant-wide unit of employees who performed work involved in pavement coatings and markings. The two unions argued that the collective bargaining history between the parties required a finding that the two historical units constituted appropriate units and should not be disturbed.

The Board agreed with the Regional Director that the record demonstrated no rational basis for the existence of the two historical units other than being purely historical accidents. In finding that the community of interest between the two groups of employees overweighed any collective bargaining history, the Board agreed that there was overwhelming community of interest between the two groups of employees with no identifiable characteristics which would separate and identify employees in one unit from those in the other unit in terms of job functions and characteristics.

The extensive community of interest demonstrated between the employees in ***A.C. Pavement Striping*** is not present in the instant case. In ***A.C. Pavement Striping***, no particular skills were required for the work performed. The painters were not hired based on their skills as painters. ***Id.*** at 209. Here, the bricklayers and cement finishers possess different skill sets, are trained separately in their trades, receive certifications related to their specific craft, are compensated differently regarding wages and fringe benefits, and use different tools. In addition, combining the two units in ***A.C. Pavement Striping*** created an overall employerwide unit. Here, the Petitioner now is attempting to represent a unit of only two trades among a number of other trades, including laborers, roofers, carpenters, operating engineers, and ironworkers, all of whom have occasional overlap in job duties and all of whom historically have constituted separate units. Thus, there is a rational basis for continuing the existence of the historical units.

The Petitioner argues that the occasional overlap of work among the two groups of employees establishes a community of interest sufficient to find in favor of the petitioned-for unit. However, that argument is weakened by the Petitioner's May 2006 contract proposal to the Employer to represent the cement finishers separately and its original petition in this case whereby it sought a unit of cement finishers only.

There is nothing intrinsically inappropriate about the existing units. The existing units are not repugnant to the Act and the Petitioner has not established sufficiently compelling circumstances that would warrant disturbing the established unit currently represented by the Intervenor. See ***Canal Carting, Inc***.,

supra. Additionally, the area practice here supports a finding of separate units. See ***The Mirage Casino Hotel***, 338 NLRB 529, 534 (2002).

While I find separate units appropriate, I also find that, if a majority of valid votes in each unit is cast for the same union, a combined unit would be appropriate. Thus, I will direct a self-determination election or elections, if appropriate, as detailed below. This finding, in accordance with Section 9(b) of the Act, will help to assure employees the fullest freedom in exercising the rights guaranteed by the Act by providing separate elections in each unit and also possibly giving employees the opportunity to be represented in a combined unit.

Conclusion

The occasional overlap of work among the various groups of trade employees, which has historically occurred without objection from any of the trade unions, is not sufficient to outweigh the parties' significant collective bargaining history in separate units. The bargaining history between the Employer and both unions from 1997 to the present weighs heavily in favor of respecting the historical separate bargaining units of bricklayer and cement finisher employees. Thus, I will be directing elections in separate voting groups. However, as noted, I also will be directing a self-determination election or elections, if appropriate.

5. For the reasons stated above, I conclude that self-determination elections are appropriate for the following voting groups which may constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[10]

VOTING GROUP A: All full-time and regular part-time cement mason employees engaged waterproofing/restoration work employed by the Employer at or out of its facility located at 13800 Eckles Road, Livonia, Michigan; but excluding bricklaying employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

VOTING GROUP B: All full-time and regular part-time bricklayer employees engaged in waterproofing/restoration work employed by the Employer at or out of its facility located at 13800 Eckles Road, Livonia, Michigan; but

[10] The Petitioner reserved its position regarding whether it wished to proceed to elections in both separate voting groups if found appropriate. The Intervenor was not asked whether it wished to participate in an election in the bricklayer employee voting group. The Petitioner must advise the undersigned, in writing, of its intent to proceed to an election in one or both voting groups found to be appropriate within 7 days from the date of this Decision and Direction of Elections. The Intervenor also must advise the undersigned, in writing, of its intent, if any, to proceed to an election in the voting group of bricklayer employees within 7 days from the date of this Decision and Direction of Elections. If the Interevenor wishes to proceed to an election in that voting group, it is allowed 14 days from the date of this Decision and Direction of Elections to provide sufficient showing of interest for that voting group.

excluding cement mason employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

If a majority of valid cotes in both Voting Group A and Voting Group B are cast for the same union, then the two Voting Groups shall be combined into the following single unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cement mason employees and bricklayer employees engaged in waterproofing/restoration work employed by the Employer at or out of its facility located at 13800 Eckles Road, Livonia, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

If a majority of valid votes in Voting Group A and Voting Group B is cast for different unions, the two Voting Groups shall remain as separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Those eligible are set forth in the attached Direction of Elections.[11]

Dated at Detroit, Michigan, this 1st day of August 2006.

"/s/[Stephen M. Glasser]."

(SEAL) /s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

[11] The construction industry eligibility formula set forth in ***Daniel Construction Co.***, 133 NLRB 264 (1961), applies to all employees in the construction industry and is applicable to this case. Specifically, in ***Steiny and Co.***, 308 NLRB 1323, 1327-1328 and fn. 16 (1992), the Board held that the construction industry eligibility formula applies to all construction industry elections unless the parties stipulate not to use it. The parties did not stipulate at the hearing that the ***Daniel/Steiny*** formula would not apply. Therefore, I find that the ***Daniel/Steiny*** formula is appropriate here and will be applied to all eligible voters as noted in the attached Direction of Elections.

DIRECTION OF ELECTIONS

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Ineligible are those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision **3** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **August 8, 2006.** No

extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by**, August 15, 2006**.

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.